AGAR SUPPLY CO. 1267

Agar Supply Company, Inc. *and* Teamsters, Local 25, a/w International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 1–RC-21417

September 6, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered challenges to an election held on October 25, 2001, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 59 for and 59 against the Petitioner with three challenged ballots, which are determinative of the outcome of the election.¹

The Board has reviewed the report on challenged ballots, pertinent portions of which are attached as Appendix, and the Employer's exceptions and brief, and has adopted the Regional Director's findings² and recommendations.³ Accordingly, we shall overrule the challenge to Robert Koch's ballot and direct that it be opened and counted.

ORDER

IT IS ORDERED that this proceeding is remanded to the Regional Director for further appropriate action.

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would sustain the challenge to Koch's ballot. In December 2000, Koch began receiving workers' compensation benefits and was absent from his bargaining unit position due to his injuries. In January 2001, Koch returned to work and took a nonunit position. In March 2001, he again ceased working and

has not returned to work. Inasmuch as Koch most recently was employed in a nonunit position, he was ineligible to vote in the election. In my view, *Red Arrow* is inapplicable to this situation, and I find it unnecessary to pass on its validity.

APPENDIX

REPORT ON CHALLENGED BALLOTS

Pursuant to a Stipulated Election Agreement executed by the Petitioner and by the Employer on September 21, 2001, and approved by the undersigned on September 25, an election was conducted on October 25 among certain employees of the Employer.

The tally of ballots cast at the election is as follows:

Approximate number of eligible voters	128
Void ballots	0
Votes cast for Petitioner	59
Votes cast against participating labor organization	59
Valid votes counted	118
Challenged ballots	3
Valid votes plus challenged ballots	121

The challenged ballots are determinative of the results of the election. At the election, the Employer challenged the ballots of Moses Massa and Jamie Medeiros on the ground that they had been terminated. The Board agent conducting the election challenged the ballot of Robert Koch on the ground that his name did not appear on the *Excelsior* list of eligible voters.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the challenged ballots was conducted. As a result of the investigation, I find, for the reasons discussed below, that Moses Massa and Jamie Medeiros are not eligible voters and, accordingly, I recommend that the challenges to their ballots be sustained. I further find that Robert Koch is an eligible voter and, accordingly, I recommend that the challenge to his ballot be overruled, that his ballot be opened and counted, and that a revised tally of ballots be issued.³

¹ No party has filed exceptions to the Regional Director's recommendation to sustain the challenges to the ballots of Moses Massa and Jamie Medeiros.

² Contrary to our dissenting colleague, we agree with the Regional Director, for the reasons set forth in her report, that the Employer has not shown that Koch was transferred to a nonunit position when he was temporarily assigned to light duty work as a warehouse clerical employee.

³ Member Bartlett agrees with former Chairman Hurtgen's dissent in Supervalu, Inc., 328 NLRB 52 (1999), that the appropriate test for determining the eligibility of an employee on sick leave is the "reasonable expectancy of return" test, the same test that is applied to employees laid off for economic reasons. See also Vanalco, Inc., 315 NLRB 618 (1994) (Member Cohen dissenting). Thus, he disagrees with the prevailing test set forth in Red Arrow Freight Lines, 278 NLRB 965 (1986), which presumes that an employee on sick leave is eligible to vote unless it is affirmatively shown that the employee has resigned or been discharged. However, in the absence of a three-Member Board majority to overrule Red Arrow, and in order to avoid unduly delaying a final determination of the election results, Member Bartlett joins in adopting the Regional Director's finding that, under the Red Arrowtest, employee Robert Koch was eligible to vote in the election.

All dates herein are 2001 unless otherwise indicated.

² The appropriate collective-bargaining unit, as set forth in the Stipulated Election Agreement, is:

All full-time and regular part-time warehouse selectors, warehouse receivers, warehouse replenishers, warehouse selector trainees, warehouse truck strippers, fork lift operators, drivers, yard drivers, driver trainee, building maintenance personnel and warehouse janitorial employees, but excluding all supervisors, managers, office clericals, warehouse clericals and guards as well as wholesale general sales persons, wholesale F RI sales persons, corporate administration, corporate data processors, wholesale credit persons, truck maintenance superintendent, truck routers dispatchers, corporate accounting personnel, wholesale buying personnel, warehouse supervisors, inventory control, wholesale payable persons, wholesale account persons and wholesale administrative employees.

³ Objections to conduct affecting the results of the election were timely filed by the Petitioner on October 31. No objections were filed by the Employer. If a revised tally of ballots shows that the Petitioner has not received a majority of valid votes cast, then we will further process the Petitioner's objections.

Moses Massa and Jamie Medeiros

Moses Massa (Massa) and Jamie Medeiros (Medeiros) were both terminated by the Employer prior to the date of the election. On October 23, Medeiros filed an unfair labor practice charge in Case 1-CA-39445, alleging that the Employer violated Section 8(a)(3) and (1) of the National Labor Relations Act by terminating him on October 8. By letter dated December 20, 2001, I approved the withdrawal of the charge in Case 1-CA-39445, and the case was closed. On November 6, 2001. Massa filed an unfair labor practice charge in Case 1-CA-39477, alleging that the Employer violated Section 8(a)(3) and (1) of the National Labor Relations Act by terminating him on October 16. By letter dated December 18, 2001, I approved the withdrawal of the charge in Case 1-CA-39477, and the case was closed. In the absence of a complaint based on an unfair labor practice charge, the Board will not normally consider unfair labor practice issues involving discharges in objections or challenges proceedings. Texas Meat Packers, 130 NLRB 279 (1961), and McLean Roofing Co., 276 NRLB 830 fn. 1 (1985). In view of the withdrawal of the charges concerning the terminations of Massa and Medeiros, their discharges must be presumed to be lawful and cannot be contested in this challenged ballot procedure.

The test for determining eligibility to vote in an NLRB election is an individual's status on both the eligibility date and the date of the election. *Nichols House Nursing Home*, 332 NLRB 1428 (2000), citing *Roy N. Lotspeich Publishing*, 204 NLRB 517 (1973). Accordingly, as they were no longer employed on the date of the election, Massa and Medeiros must be found to be ineligible to vote in the election. *Spray Sales & Sierra Rollers*, 225 NLRB 1089 (1976). Accordingly, I recommend that the challenges to the ballots of Massa and Medeiros be sustained.

Robert Koch

The Petitioner maintains that Robert Koch was employed in a unit position, was on workers' compensation at the time of the election and, therefore, was eligible to vote. The Employer takes the position that, at the time of the election, Koch was not an active employee and was not employed in a unit position, and, therefore, he was ineligible to vote.

Koch was first employed on March 19, 2000, in the position of order selector in the warehouse. This job title is included in the unit description in the Stipulated Election Agreement signed by the parties. (See footnote 2).

On September 8, 2000, Koch sustained an on-the-job injury. He was absent from work for about 2 weeks in late September and early October 2000 as a result of his injuries. From December 7, 2000, to January 29, 2001, Koch was again absent and received workers' compensation benefits. He returned to active status on a light duty assignment on January 29, and was assigned the duties of a warehouse clerical. This job title is specifically excluded from the unit by the election agreement. On about March 1, Koch again ceased working due to his pre-existing injuries. He again received workers' compensation benefits at that time and remained in that status as of and after the date of the election.

The Employer argues that since Koch was not "qualified" to do unit work on the payroll eligibility date and since, based on the medical information then available, it was not "reasonably foreseeable" that he could ever perform unit work again, he was properly excluded from the *Excelsior* list and is not an eligible voter. The Employer also argues that if Koch is to be considered an active employee, than he should still be deemed to be ineligible because his last period of work for the Employer involved warehouse clerical work, a nonunit position.

The fundamental rule governing the eligibility of an employee on sick or maternity leave is that an employee is presumed to continue in such status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned. *Red Arrow Freight Lines, Inc.*, 278 NLRB 965 (1986); and *Sylvania Electric Products*, 119 NLRB 824, 832 (1957). This same standard applies to employees on workers' compensation benefits. *Douglas Foods Corp.*, 330 NLRB 821 (2000).

The "reasonable expectation of employment" test applies to eligibility determinations involving laid-off employees. *Higgins, Inc.*, 111 NLRB 797, 799 (1955). Although in some isolated cases the Board may have inadvertently used such language in cases involving employees on sick or maternity leave, that standard no longer applies to these situations. See *Red Arrow*, 278 NLRB fn. § and *Custom Bent Glass Co.*, 304 NLRB 373 (1991).

Further, neither the nature of the injuries nor the possibility that the employee might ultimately be forced to seek employment of a different nature changes this principle. Id. The fact that Koch performed light duty work for about a month in early 2001 in an attempt to accommodate his injuries does not signify the termination of his regular unit position, absent some specific indication to the contrary. There is no evidence that this change in duties was of a permanent or voluntary nature, or for any other reason than Koch was physically unable to perform his regular duties as a result of his injuries at that time. Accordingly, the evidence is insufficient to establish that Koch discharged, resigned, or was transferred to a nonunit position.

Therefore, inasmuch as the evidence establishes that Robert Koch was still employed in a unit position at the time of the election, I find that he was eligible to vote in the election. Accordingly, I recommend that the challenge to the ballot of Robert Koch be overruled.

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Recommendation

Having found merit to the challenges to the ballots of Moses Massa and Jamie Medeiros, I recommend that those challenges be sustained and that their ballots not be opened and counted. Having found Robert Koch to be eligible to vote, I recommend that the challenge to his ballot be overruled, that his ballot be opened and counted, and that a revised tally of ballots be issued.⁴

Under the provisions of Section 102.69 (g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support is [of] its position on challenged ballots, which are not included in this report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in this report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

⁴ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by January 18, 2002.